

①

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LEROY RILEY

Plaintiff,

v.

CHARLES SIMPSON, KERRI CROSS,
DAVID MCCOY, CHARLES M. SHANE
MR. GASTON, sued in there
individual capacities,
DAVID J. GOOD, sued in his
individual and official
capacities
Defendants.

Civil Action No. 05-172E

Judge Sean J. McLaughlin
Magistrate Judge Susan B. Paradise

FILED
AUG 16 10:57 AM
CLERK
DISTRICT COURT

APPEAL MAGISTRATE REPORT AND RECOMENDATION

The Magistrat judge and report and recomendation moves to dismiss plaintiff cpmplaint on the grounds plaintiff has not provided any evidence that he filed an appeal to the Superintendent office earlyer then September,29 2004.

1. On June 6th a Grivence was filed by the plaintiff in regards to the misconduct, this grivence was responded to on June 8, 2004 directing the plaintiff to follow the procedures directive DC ADM801.

2. On July 12, 2004 following the Programe Review Committée decision, the plaintiff filed his appeal to the Superintendent office according to directive DC ADM 801(no copy has been retain by plaintiff) This appeal was never responded to.

A motion to dismiss filed pursuant to Federal Rule of Civel Procedure 12(b)(6) must be viewed in light most favorable to the plaintiff and all well-pleaded allegations of the complaint must be accepted as true. NEITKE V. WILLIAMS, 409 U.S. 319 (1989) The Motion cannot be granted unless the court is satisfied "that no relief could be proved consistent with the allegations." HISHON v. KING & SPAULDING, 467 U.S.69,73 (1984). Rule 8(a) of Federal Rules Of Civel Procedure states that a pleading must set forth a claim of relief which contains a short and plain ststement of the claim showing that the pleader;

Sec
EX
A1

is entitled to relief. The issue is not whether the plaintiff will prevail at the end but whether he should be entitled to offer evidence in support of his claim NEITZKE v. WILLIAMS, 409 U.S. 319 (1989). Pro se Pleadings and brief must be held to "less stringent standards than formal pleadings drafted by lawyers, and can only be dismissed for failure to state a claim if it appears "beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." HAINES v. KENER, 404 U.S. 519, 520-502(1972).

3. On Sept, 11, 04 an appeal was submitted to the Superintendents office and dated received by them on Oct, 1st 2004, This appeal was also never responded too. see Exhibit (B) in the chronology.

4. An appeal dated Dec, 10, 04, also was submitted to the superintendent office, this appeal also was never responded too. see exhibit (C) Notably" On this appeal dated 12/10/04 , it took up to 30 days before it reach the Superitendent office. "No response".

5. Thereafter the plaintiff made repeated request for a review of his misconduct.

6. On January 5th 2006 the plaintiff received a letter from the assitant superitendant stating that there is no record of any appeal of a misconduct was submitted to the superintendents office see exhibit (D) in the chronology.

7. The above chronology and the plaintiff records shows, "granted plaintiff did not retain the first appeal to superintendent" that there is ample evidence in the exhibits submitted that on a number of occasions that an appeal was received by and stamped receive by there office, never-the-less there office claims they never received an appeal by the plaintiff, moreover the plaintiff exhibits show on more then one occasion it took up to 30 days to reach the office of the superintendents. "The Appeal"

8. The reason the plaintiff did not retain the first copy of his appeal before September 2004 was when he submitted it back in June of 2004 in punitive segregation there is no way to make copies in the short time. plaintiff sent the originals believing a prompt answer would follow.

9. In light of the actions of the superintendents office failure to respond to the plaintiff appeals of his misconduct resulted in the plaintiff to be procedurally defaulted in fillfulling the 2nd step of the administrative appeal process.

10. There can only be two logical explanation for the failure of the superintendant not to respond, First with malice intent; Two, with out malice intent "lost". In any event the procedure process in the superintendents office broke down denying the plain-his due process right 8th and the 14th amendment of the Constitution.

11. Failure to rule in the plaintiff favor will result in unfairness and in-justice in this case. If the Court accept the fact that it is OK for the superintendent to arbitrarily missplace or claim that they never receive an appeal of a misconduct and in some case's take up to 30 days to reach ther office, knowing that inmates in confinement cannot make copy to prove allagations of sent documents", if this position is taken by this court we will be given a blank check to prison official to inflect any punishment they please for any infractions or rules. The prison official could subject the prisoner to any punishment and the court would be powerless to intrvene,

WHEREFORE, this plaintiff request that this Complaint not be dismissed. The plaintiff made a good faith effort to exhaust all his administrative remedies.

Sincerely Submitted

Date: 8/5/2006

